

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
THE BANK OF TOKYO-MITSUBISHI : Docket #1:17-cv-08691-  
UFJ, LTD., : SHS  
 :  
Plaintiff, :  
 :  
- against - :  
 :  
VULLO, : New York, New York  
 : December 7, 20107  
Defendant. :  
----- :

PROCEEDINGS BEFORE  
THE HONORABLE SIDNEY H. STEIN,  
UNITED STATES DISTRICT COURT JUDGE

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None

E X H I B I T S

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None

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THE CLERK: Bank of Tokyo v. Maria Vullo, 17 civil  
8691. Counsel, please state your names for the record.

MR. RICHARD PEPPERMAN: Rick Pepperman from  
Sullivan & Cromwell on behalf of the plaintiff, Bank of  
Tokyo-Mitsubishi.

MS. BETH D. NEWTON: Beth Newton, also from  
Sullivan & Cromwell on behalf of the plaintiff.

MR. ROBERT LONG: And Robert Long from Covington &  
Burling, also on behalf of the plaintiff, your Honor.

HONORABLE SIDNEY H. STEIN (THE COURT): Good  
morning.

MR. CHARLES SANDERS: Charles F. Sanders, S-a-n-d-  
e-r-s from the New York State Office of the Attorney  
General here for the New York State Department of Financial  
Services.

MR. NATHANIEL DORFMAN: And Nathaniel Dorfman with  
the Department of Financial Services, as well. Good  
morning, your Honor.

THE COURT: Good afternoon. Please be seated.

First thing is it was brought to my attention that  
the papers underlying the request for a Temporary  
Restraining Order and Order to Show Cause bringing on the  
Motion for Preliminary Injunction were not publicly filed.  
I filed the unsigned document, but the public record really

1  
2 should reflect what -- the papers supporting that  
3 determination by me. So, plaintiff, you should do that.

4 MR. PEPPERMAN: We've been in contact with your  
5 courtroom deputy, and we will file them this afternoon,  
6 your Honor.

7 THE COURT: Excellent. Now, yesterday or the day  
8 before, there was a stipulation which I signed providing  
9 for defendant to answer or move in response to the amended  
10 complaint by January 31, so that's in place. I've read the  
11 amended complaint, and I think we have a way of going  
12 forward.

13 Plaintiff, why don't you bring me up to date just  
14 so I understand what's happened since we last met.

15 MR. PEPPERMAN: Yes, your Honor. Two things, I  
16 think, merit bringing the Court up to speed on. The  
17 first --

18 THE COURT: And I should say we're recording this;  
19 it's being taped electronically, so you're aware of that.  
20 Go ahead.

21 MR. PEPPERMAN: Okay. Thank you, your Honor.

22 The first is that the plaintiff has decided to  
23 withdraw its motion for a preliminary injunction. We had  
24 decided to do that for two reasons. First, in view of the  
25 Department of Financial Services' representation that it

1  
2 will not exercise any supervisory authority over BTMU  
3 while the bank's federal licenses are in effect. We  
4 believe that the exigent circumstances that warranted  
5 interim relief have been addressed.

6 And, second, your Honor, we believe that the  
7 issues raised by our amended complaint are pure issues of  
8 law that do not raise disputed factual questions. So we  
9 believe that those issues can be promptly resolved through  
10 motion practice after the defendant responds to our  
11 complaint. And if we're going to promptly resolve these  
12 issues finally through motion practice, it didn't seem to  
13 make sense to go through the drill of briefing and arguing  
14 those issues on an interim basis in the context of a  
15 motion for a preliminary injunction.

16 THE COURT: All right, if the record doesn't  
17 already reflect it, then part of the resulting order from  
18 today's conference will be that the plaintiff is  
19 withdrawing its motion for a preliminary injunction.

20 Next.

21 MR. PEPPERMAN: And then the second thing I'd  
22 like to bring the Court up to speed on, the Court noted  
23 the proposed schedule that we submitted yesterday and that  
24 the Court entered that provides that the defendant's  
25 response date is January 31, 2018. The reason for what

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might be viewed as a bit longer than usual response period to the amended complaint is two-fold. The first is, obviously, that Mr. Sanders and his colleagues at the New York Attorney General's Office, plus Mr. Dorfman and his colleagues at the Department of Financial Services, wanted adequate time to study the amended complaint and the issues raised by it, and we do have the intervening holiday period. So the extra time seemed appropriate.

THE COURT: It didn't bother me.

MR. PEPPERMAN: And second, and, you know, equally relevant in following up on the discussion we had with the Court when we were last here on November 9, we've agreed with the New York Attorney General's Office and the Department of Financial Services that between now and January 31, we'll continue to discuss the case and see if there's a way for the parties to resolve their legal disagreement in a manner that won't require further assistance from the Court.

THE COURT: All right, well, you've just pressed two buttons. One is the parties are discussing settlement, and the other was a motion is withdrawn. So you clearly know how to talk to a judge.

All right. Let's hear from the defense.

MR. SANDERS: Good morning and good afternoon,

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your Honor. As far as what Mr. Pepperman said, yes, we are in agreement. They indicated they were withdrawing the motion for the preliminary injunction. And also, we are going to further discuss this matter. We've already had a preliminary discussion; we will continue to see where we are.

Under the circumstances, having just received the amended complaint and the documents annexed thereto, I cannot opine as to whether or not that, you know, if we answer or if we move -- well, if we move, there wouldn't be a need as far as to -- to go forward as far as with any other matters, but --

THE COURT: I'm sorry, say that again? I'm not sure --

MR. SANDERS: I said if we choose to move, then we will let the parties know. But if we answer, I don't know at this point as to whether or not that we can just go forward on just what the record is at this time because we have not had an opportunity to review and assess documents. We have just received by means of the amended complaint further documents as far as a review. But, again, we are willing to cooperate; and if motion practice is appropriate, we will engage with that with counsel.

THE COURT: All right. But tell me what the

1 state of play is as of now. Does the Department of  
2 Financial Services still take the position -- and this is  
3 without prejudice to how it works out here -- still take  
4 the position that it has the ability to investigate the  
5 Bank of Tokyo for actions taken prior to its conversion to  
6 a federal bank in November?  
7

8 MR. DORFMAN: At this point, your Honor, I would  
9 say the answer is yes.

10 THE COURT: All right. And I need -- because  
11 this is a declaratory judgment action -- so my focus, I  
12 think, should be on the imminence of injury, imminence  
13 (indiscernible) I guess of injury, are you free to say  
14 whether there's any such investigation underway at this  
15 point?

16 MR. DORFMAN: Let's just say there will be no  
17 further investigation going forward as far as on the  
18 matter because, again, the charter has been as far as  
19 filed with the Office of the Comptroller of the Currency.  
20 However, there are still pending matters that still need  
21 to be addressed as far as under the consent decrees that  
22 have been entered into between the Bank of Tokyo and DFS,  
23 and all those matter, to my knowledge, have not been  
24 finalized as of yet. And, therefore, that's part of the  
25 discussion that we will have as far as with counsel to see

1  
2 if that can be remedied during the interim, which would  
3 bypass as far as further litigation before this Court, and  
4 alternatively, resolved as far as administratively,  
5 therefore no need for your further as far as involvement.

6 If we can't then, let's just say, your Honor,  
7 that we would respond accordingly as far as --

8 THE COURT: All right, but let me see if I  
9 understand what you're saying. To your knowledge, there's  
10 no ongoing -- no further investigation will be taking  
11 place in regard to let me call it preconversion  
12 activities. The conversion was either November 7 or  
13 November 8, if I'm not mistaken. Am I right about that  
14 representation?

15 Mr. Dorfman, you can speak directly, if you  
16 prefer. It's really -- it's whatever you gentlemen wish.

17 MR. DORFMAN: So I think the issue is with the  
18 word "investigation." We are taking no active effort to  
19 exercise supervisory or visitorial powers against the  
20 bank. We do have, though, a file that was developed prior  
21 to the conversion that we are evaluating. So I guess, you  
22 know, the question of whether enforcement action is going  
23 to be taken is still an open question. We can represent  
24 that we will not do anything extra-judicially. So, you  
25 know, if enforcement action is taken, it will be through,

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2 you know, this court or another court and not through an  
3 administrative or visitorial or supervisory process.

4 THE COURT: Now, Mr. Sanders was talking about  
5 consent decrees which were entered into prior to the  
6 conversion date. What's the position of the DFS in regard  
7 to those? If you don't know, don't make a representation.  
8 I don't want anything that you feel uncomfortable with.

9 MR. DORFMAN: So up until the day of the OCC  
10 conversion taking place, DFS was acting under those  
11 consent orders with the bank. And, again, there is a file  
12 of preconversion conduct that was discovered, evaluated,  
13 between the timing of that last consent order and the date  
14 of conversion that we are still evaluating. I mean, we're  
15 not taking steps to investigate or discover more conduct  
16 from that period, but we do have a, you know, a rather  
17 thick file that we're evaluating what to do with.

18 THE COURT: All right, well, it seems to me that  
19 both of those, that that's certainly an area for the  
20 discussions with the bank between now and January 31.

21 MR. DORFMAN: Correct.

22 THE COURT: All right. Mr. Pepperman, your  
23 amended complaint raises an issue, I believe, in regard to  
24 New York Banking Law Section 605. What are you seeing  
25 there?

MR. PEPPERMAN: Well, your Honor, that is a component of the issue that we believe that the defendant has raised as to the validity of the federal licenses issued by the OCC. The defendant has presented two different categories of challenges to those licenses. The first is under state law, particularly Section 605 of the New York Banking Law, and that was raised in Paragraph 3 of the order that the DFS entered on November 8. And I believe that's Exhibit D to our amended complaint. So Section 605 is a component of what has been to date the DFS's challenge to the validity of the federal licenses.

I mean, the second bucket of challenges are those under federal law which were raised in the defendant's November 13 letter to the OCC.

Your Honor, if I may go back to just one thing, just as I think I'd be remiss if I didn't raise this. I mean, we came into court this morning comfortable with our position that interim relief from this court was going to be unnecessary at least between now and January 31. I'm a bit concerned by Mr. Dorfman's statement that the Department reserves the right to commence an enforcement action, I think as he put it, in this court or another court. I mean, I think if they really do, if the Department intends to bring such an enforcement action,

particularly before a different judge and in a different court between now and January 31, that might --

THE COURT: Well, I understand. I didn't hear that at all. Besides, it was a lawyer reserving his right; that's all he was doing.

MR. DORFMAN: Well, your Honor, the only thing that I'd ask -- and I'm happy after this conference to discuss this with Mr. Sanders and Mr. Dorfman -- is if the Department intends to do that, I mean, we would like some modest degree of notice of that.

THE COURT: I think as a courtesy, I see no reason why they wouldn't do that.

Defense?

MR. DORFMAN: I have no issue, no problem as far as having that continued discussion.

THE COURT: All right. Thank you.

Again, I think all that Mr. Dorfman was doing was what he said he was doing; he's reserving his right.

Now, in terms of the issue of the validity of the federal license, what's the imminence of the risk? Remember, your three causes of action are declaratory judgments, so it puts it in a little different position than normal -- I mean, than the normal case. I don't think *MedImmune* helps you on that. I went back to

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2 *MedImmune* because you cite it for that purpose. The cases  
3 that *MedImmune* cites are, you know, somebody shouldn't  
4 have to risk being arrested by handing out pamphlets or  
5 leaflets, something like that. It was sort of somebody  
6 who has a Hobson's choice: violate the law or don't do  
7 the action. That's not what we're talking about here.  
8 What's the imminence? And, again -- I'm just thinking  
9 this through; I don't want to change any of your  
10 discussions -- but what's the imminence of the validity of  
11 your federal license being in jeopardy?

12 MR. PEPPERMAN: Well, the situation in which we  
13 find ourselves is that the Department of Financial  
14 Services has publicly challenged the validity of our  
15 federal licenses.

16 THE COURT: Well, they wrote a letter, right?  
17 That's what you're talking about. They wrote a letter;  
18 they said we don't know about this.

19 MR. PEPPERMAN: Well, they did it in three  
20 contexts; in the order that they entered on November 8,  
21 the DFS order, Exhibit D; the reservation of rights they  
22 made before this court on November 9; the letter that they  
23 sent to the OCC on November 13, which immediately received  
24 widespread press attention in the Wall Street Journal, the  
25 New York Times, and other things.

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2           The bank finds itself in a position where it's  
3 operating under the shadow of a looming challenge from its  
4 former state regulator to the validity of the licenses  
5 that permit it to operate daily in the state of New York.  
6 In the meantime, having converted its licenses, the bank  
7 wants to go forward with planning processes to sort of put  
8 in place that it needs to operate in accordance with the  
9 supervisory requirements and expectations of the OCC. If  
10 those licenses are going to be challenged and --

11 THE COURT: Well how are those licenses going to  
12 be challenged? There's an order that presumably was given  
13 to the press by the or at least I would think, I would  
14 hope, was publicly filed by the DFS. Somebody apparently  
15 picked it up. But where do you see that your OCC license  
16 is at risk?

17 MR. PEPPERMAN: Well, your Honor, what we see is  
18 the reservation of rights when it was made today, the  
19 Department of Financial Services is reserving the right at  
20 any day to challenge the validity of those licenses and  
21 claim that if the licenses were improperly issued during  
22 the pendency of the time when the bank was operating under  
23 federal licenses instead should have been complying with  
24 New York State requirements. And we're forced in a  
25 position where we're either going to come into work every

1 day and say, "Is this the day that the DFS sues to  
2 invalidate the license?" or having already commenced a  
3 legal action, we can get a decision from this court on the  
4 validity of the licenses that makes clear our ability to  
5 operate going forward. I mean, we would like nothing more  
6 than to resolve these issues and know that we can go  
7 forward under our federal licenses without the threat of  
8 challenge from the Department of Financial Services.  
9

10 THE COURT: All right. I understand. Thank  
11 you. And, again, I'm just trying to understand the  
12 issues. I don't mean to put my thumb on the scales of  
13 discussions.

14 Let me end by where I began in the conference in  
15 early November, and that is I think there's less here than  
16 meets the eye. Why don't the parties talk to each other,  
17 see where we are; and then at the end of January, we'll  
18 have a response from the DFS, either a motion or an answer  
19 to the amended complaint. If the parties have not  
20 resolved it, we'll go forward on that basis. I tend to  
21 think these are legal issues, but if the DFS wants to  
22 think about that in terms of its response, that's fine.  
23 And I may be wrong.

24 Why don't we set a conference in mid-February?  
25 We'll see where we are. If there's a motion, I may cancel

that conference; or for that matter, obviously, if this settles before then, there won't be a conference. But let's meet in mid-February, see where we are in the case.

February 20, 2018, 9:30 AM. If you need me before then, just write, and I'll bring you in.

All right. Talk to each other. I really do think this should be amenable to resolution between the parties. Anything else I can do for plaintiff?

MR. PEPPERMAN: No, your Honor. Thank you.

THE COURT: Anything else I can do for defense?

MR. SANDERS: No, your Honor.

THE COURT: All right. Thank you all for coming in.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of The Bank of Tokyo-Mitsubishi UFJ, LTD v. Vullo, Docket #17-cv-08691-SHS, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: December 11, 2017